

**BJ'S Wholesale Club, a Subsidiary of Waban, Inc.
and Local 371, United Food & Commercial
Workers Union, AFL-CIO, CLC. Case 34-CA-
6596**

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On November 16, 1994, Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel filed exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In affirming the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by issuing a verbal warning to employee John Cavaliere for "harassing [a] team member" in the course of soliciting authorization cards, we find that the Respondent lawfully responded to employee Teresa LaTorrre's request, following repeated interruptions by Cavaliere during worktime, that the Respondent stop Cavaliere from harassing her while she worked. Cavaliere's testimony was discredited, and the credited testimony of General Manager Tom Norris establishes that the Respondent had a policy prohibiting employees from harassing coworkers. The legitimacy of the Respondent's no-harassment rule is not in dispute. Further, the Respondent did not solicit complaints from employees about Cavaliere's union activity, and unlike the cases on which the General Counsel relies, he was not disciplined for violating an unlawful no-solicitation rule nor was he falsely accused of interfering with work. Cf. *PPG Industries*, 251 NLRB 1146, 1147-1148, 1168 (1980); *Switchcraft, Inc.*, 241 NLRB 985 (1979); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972). In agreeing with the judge's dismissal of these allegations, we note that the Respondent has established the equivalent of a *Wright Line* defense. *Wright Line*, 251 NLRB 1083 (1980). As noted above, the lawfulness of its no-harassment rule is not in dispute, and LaTorrre complained to the Respondent that Cavaliere was harassing her. Moreover, the Respondent established that it had previously counseled Cavaliere about harassment after another employee complained about his conduct. This prior incident, which occurred in 1993, did not involve union activity. The foregoing establishes that the Respondent's issuance of the warning was motivated by conduct unrelated to Cavaliere's solicitation of union authorization cards and did not violate the Act.

John Gross, Esq., for the General Counsel.
Irving Ritz, Esq., for the Respondent Employer.

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on May 19 and a complaint issued on June 30, 1994. The General Counsel alleges in the complaint that BJ's Wholesale Club, a subsidiary of Waban, Inc. (Respondent Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing a warning to employee John Cavaliere on May 16, 1994, because he had assisted Local 371, United Food & Commercial Workers Union, AFL-CIO, CLC (the Charging Party Union) and had engaged in protected concerted activities. Respondent Employer denies in its answer violating the Act as alleged. A hearing was conducted on the issues raised in Hartford, Connecticut, on September 28, 1994, and on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Charging Party Union is admittedly a labor organization and Respondent Employer is admittedly engaged in commerce as alleged. Brian Truini, an organizer for the Union, testified that his Union had first tried to "organize" the Employer's employees during 1992 and that effort culminated in a Board-conducted representation election which the Union lost. Later, in May 1994, the Union "started a new campaign." Employee John Cavaliere "contacted" Truini "the first week of May"; they "met the next day"; Cavaliere was then given "approximately 20 Union authorization cards"; they subsequently "met basically every day" and Cavaliere "would hand [Truini] authorization cards that were filled out and [Truini] would hand him [more] blank authorization cards." The Union's "campaign" is "currently in progress."

John Cavaliere testified that he started working for the Employer in February 1992 and "quit" in June 1994. He telephoned Union Organizer Truini on May 2, 1994, because he was unhappy with "what was going on in the store" with respect to employee terms and conditions of employment. The two met the following day, May 3, and Truini then gave Cavaliere "Union authorization cards" to be distributed to Cavaliere's coworkers. Starting on that same day, May 3, Cavaliere "talked to many employees" about the Union "in the break room" and "in the store itself." He would return signed cards to Truini. From May 3 until 16, he had obtained some 30 to 35 signed "Union authorization cards" from his coworkers.

On or about May 12, as Cavaliere further testified, Cavaliere "spoke" to coworker Teresa LaTorrre "in the [store] bakery" where "she works." He recalled:

I [Cavaliere] was walking down the hallway right outside the bakery on my lunch break and I saw her [LaTorrre] standing there. I went inside in the bakery and asked her what her feelings were about the Union. She says that she didn't want to talk about it now and I said, okay, I'll talk to you later.

Cavaliere assertedly "did not" then "ask . . . her if she'd be interested in signing a [Union] card" and "did not"

"speak . . . to [her] at all that day after [his] initial conversation."

Thereafter, on May 16, as Cavaliere further testified, Cavaliere was instructed by Senior Manager Lisa Williams to meet in her office with Tom Norris, the store general manager. There,

He [Tom Norris] told me [Cavaliere] that there were three issues he wanted to discuss with me, one being a harassment complaint filed against me [by LaTorre]. . . . Norris said [nothing else] about this alleged harassment complaint at the time. . . . Second one . . . punching in six minutes late He wanted to know why I punched in late and I said, because I was consoling a [co-worker, Angela Gatlin,] and while I was consoling [her] he [, Norris, had also] asked her what was wrong while I was talking to her [and therefore] he knew The third issue was taking a break without permission . . . and I informed him that I did get permission to take my break. . . . I told him that Brenda Barnes, the supervisor on the podium at the time, gave me permission to take my break. . . . The meeting was about five minutes long and that was it. . . . They just told me that was it and have a good day.

On the following day, May 17, Cavaliere was again instructed to attend a meeting in Williams' office with Norris present. There,

[H]e [Norris] informed me that he was giving me a verbal warning for two of the three issues [previously] discussed . . . one being the harassment complaint from Terry LaTorre and [the other] punching in late. . . . He informed me that . . . LaTorre had filed a harassment complaint against me for . . . pressuring her into signing a Union authorization card three or four times in one day. . . . I said [that] was outrageous. . . . Then he informed me . . . I was getting written up for being six minutes late I informed him, but you know I was talking to Angela Gatlin, she was all upset . . . I was there before 11, I would have punched in, I was only ten feet from the clock, I was just sitting there listening to her because she was upset . . . about a friend [who had] passed away the night before. . . .

Cavaliere was then given a copy of the General Counsel's Exhibit 2, a "corrective interview" form dated May 16, stating:

On May 16, 1994 you [Cavaliere] were scheduled 11 AM-3 PM. At approximately 11:05 you were observed talking to associates on the sales floor but had not yet punched in to work and reported to the front line. You punched in at 11:07.

Additionally, on May 13, 1994, Terry LaTorre (bakery) approached Ted McGhie (LP Mgr) and said that you had harassed her while she was working in the bakery. . . .

You must report to work at the properly scheduled time and be punched in and ready to work at that time, particularly if you are already in the building. . . . Team members will not be subjected to harassment of

any kind. . . . Further violations of these policies can result in further disciplinary action up to and including termination. . . .

Teresa LaTorre testified that on May 13, 1994,

I [LaTorre] was working at the bakery and [Cavaliere] came to the bakery and asked me if I wanted to fill out a Union card. I told [him] that I was busy, that I was working, and . . . I took the card and put it in the pocket of my bakery coat. . . . I told him that I would look at it later. . . . So he left and I kept working, and he came back and asked me if I filled out the card, and I told him, no, to leave me alone, that I was busy working and . . . I didn't have time to look at it So he left again. I went on my lunch, and after a half an hour of my lunch I came back. I went back to work, and he approached me and he told me, did you already sign it, and I told him, no. So he left and I got upset and I went and told Ted McGhie . . . the LP manager . . . that I wanted to talk to him because I was upset So he [McGhie] took me to his office and he told me what was wrong. So I told him that [Cavaliere] came and gave me a Union card and that I didn't want to fill it out, but he kept buggin[g] me about it and I was too busy and I was tired and I didn't want to be bothered by no Union, to tell him to leave me alone. So [McGhie] told me that he would take care of it and I just left and went back to work.

Thomas Norris is the Employer's general manager. Norris testified that on May 16,

I [Norris] noticed [Cavaliere] standing next to one of the registers talking to another associate after 11:00 o'clock, after the Club had already opened for business. And I just asked him, actually, I noticed he didn't have his name badge on, and I asked him if he had his name badge, and at that time he told me he had not yet punched in. And then I continued on walking Shortly afterwards, Lisa Williams, my operations manager, approached me and said that she had noticed [Cavaliere] after he was scheduled to start working that day, sometime after 11, standing at the front line talking to somebody and when she approached him he told her that he had not yet punched in for work. . . . [Williams] at the time said that she would like to give him a verbal warning about the situation and I agreed based on the fact that I had had the same conversation obviously within the same five minute span of him supposedly starting his shift [Williams] said that she wanted to do the verbal warning, I agreed. . . . At the time, I also wanted to include in the verbal warning the information that had come to me regarding Terry LaTorre, so I just added that to the verbal warning that we did. . . . The information that I had which was incorrect . . . I took off and actually changed the warning notice, because obviously he [Cavaliere] had talked to somebody before he went on break that day and I did not want to include that in the write up because it was not true So I created a new document, tore up the old one.

Norris was admittedly "aware" that Cavaliere "was engaged in Union organizing activity" "at that time." An "associate" had previously informed Norris that Cavaliere "had been giving out some Union cards in the Club." In addition, Manager McGhie "had the Union card [of LaTorre] which [McGhie] showed [to Norris] . . ." Further, Norris conferred with the Employer's human resources department. As Norris acknowledged,

I relayed both this situation and the harassment charge to Tom Davis [in the human resources department] and he instructed me to write [Cavaliere] up for both . . . on the same warning notice.

Norris also acknowledged that he was opposed to "the unionization of the employees" as not in "the best interest" of the Employer. And, Norris admittedly had been "told" by the human resources department with respect to the Union's organizational campaign that "people were allowed to conduct themselves in the break room on their own time and any other activities I should report to them."

On this record, I am persuaded that the testimony of Teresa LaTorre, as detailed above, is credible and trustworthy. Her candid and complete recitation of the pertinent sequence of events was not even challenged on cross-examination. And, she also impressed me as a reliable witness. In short, I find here that John Cavaliere did in fact repeatedly solicit LaTorre while she was working to sign a union authorization card despite her statement to him that she was "busy" and "to leave [her] alone," and that she became "upset" and reported the incident to management. Insofar as LaTorre's testimony conflicts with the testimony of Cavaliere, I find the testimony of LaTorre to be more detailed, complete, forthright, and trustworthy. Much of the remaining pertinent testimony, including that of Brian Truini and Tom Norris, is not in dispute. In any event, insofar as the testimony of Norris conflicts with the testimony of Cavaliere, on this record, I am persuaded that Norris has more fully and forthrightly related the pertinent sequence of events.

Discussion

Section 7 of the National Labor Relations Act guarantees employees the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of" their Section 7 rights. And, Section 8(a)(3) of the Act, in turn, forbids employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In the instant case, employee Cavaliere was actively and overtly engaged in assisting the Union's organizational drive at his Employer's store. In the process, he approached co-worker LaTorre while she was "working" and asked her to sign a "Union authorization card." LaTorre then told Cavaliere that she "was busy . . . working" and "put" the card in her "pocket" stating that she "would look at it later." Cavaliere later again approached LaTorre while she

was "working." Cavaliere asked LaTorre if she had "filled out the card," and she "told him, no, to leave [her] alone, that [she] was busy working and . . . didn't have time to look at it." Cavaliere later again "approached" LaTorre while she was "working" and again asked did she "sign it," and she again "told him, no." LaTorre "got upset" this time and complained to management that Cavaliere "kept buggin[g]" her about the union card and that she "didn't want to be bothered by no Union, to tell him to leave [me] alone." In addition, Cavaliere was also late some 6 to 7 minutes "punching in" because he was engaged in a conversation with a coworker or coworkers. Management thereafter issued a warning to Cavaliere that

You [Cavaliere] must report to work at the properly scheduled time and be punched in and ready to work at that time, particularly if you are already in the building. . . . Team members will not be subjected to harassment of any kind. . . . Further violations of these policies can result in further disciplinary action up to and including termination.

On this record, I find and conclude that management, by issuing a warning to employee Cavaliere, was not impinging on his Section 7 rights or discriminating against him because he was engaging in union and protected concerted activities. It is undisputed that Cavaliere was in fact late "punching in" and there has been no showing made here that management was treating Cavaliere differently than any other employee. Further, management had received a complaint from employee LaTorre that Cavaliere "kept buggin[g]" her about the union card and that she "didn't want to be bothered . . . tell him to leave [me] alone." Management thereafter cautioned Cavaliere to "report to work at the properly scheduled time" and that coworkers "will not be subjected to harassment of any kind." Under the circumstances, the Employer has not impinged on protected activities or discriminated against an employee for engaging in protected activities. I would therefore dismiss this complaint.¹

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and the Charging Party Union is a labor organization as alleged.
2. Respondent Employer has not violated Section 8(a)(1) and (3) of the Act as alleged, and the complaint should therefore be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

It is ordered that the complaint filed is dismissed.

¹ Counsel for the General Counsel cites in his posthearing brief (Br. 16) *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972); *Switchcraft, Inc.*, 241 NLRB 985 (1979); and *PPG Industries*, 251 NLRB 1146, 1166-1168 (1980). Those cases are factually distinguishable from the credible evidence of record here.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.